Collective bargaining and equality: Making connections

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The ILO Declaration on Fundamental Principles and Rights at Work[1] adopted in 1998 could not be clearer: "the effective recognition of the right to collective bargaining" and "the elimination of discrimination in respect of employment and occupation" (ILO, 1998, Para. 2 (a) and (d)) are both so central to the ILO's social justice mandate (ILO, 1919) and Decent Work Agenda (ILO, 1999; Egger, 2002) that they are two of the four fundamental principles which Members of the ILO have a "good faith obligation … to respect, to promote and to realize" (ILO, 1998, Para. 2). Both are among the immutable principles embodied in the ILO Constitution and represent robust standards of egalitarian and democratic inspiration that stress the centrality of enfranchisement within the world of work, reflected in the ILO's Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). For generations, both these principles have been dynamically interpreted and applied by the ILO's supervisory machinery (Maupain, 1999; Swepston, 1998). And now, with the adoption of the ILO Declaration, both are urgently reaffirmed by the ILO and its Members "in a situation of growing economic interdependence" (ILO, 1998, Preamble, para. 7) as essential components to promote a vision of "sustainable development" that sees the economic and the social as mutually reinforcing (ibid., para. 3; Sen, 1999a; Langille, 1999; ILO, 2004).[2]

Despite the ILO's longstanding commitment to collective bargaining and the elimination of discrimination, initiatives to explore the interface between the two principles have only recently emerged, and have

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[1] Hereinafter ILO Declaration.

[2] It bears noting that the preamble to the ILO Constitution of 1919 also refers to the "special and urgent importance" of the principle of equality in employment.

focused overwhelmingly on gender equality (ILO, 2003, p. 101). The ILO Declaration resists the impulse to establish a hierarchy between collective bargaining and equality, merely setting these principles apart from the broader range of labour standards. In an increasingly integrated transnational context that challenges traditional labour regulation structures, the time is now ripe to investigate the complex and changing relationship between these two fundamental principles and rights at work.

The starting-point for this article is that, despite an overwhelming rate of ratification of Convention No. 98, effective recognition of the right to collective bargaining remains elusive for the vast majority of workers. Globally, only a minority of workers benefit from the free and fair representation of their collective rights, needs and interests. Unequal access to collective bargaining shows how far dominant paradigms of collective bargaining have failed to reflect the plural structures of work, notably in the informal economy and in the developing world. Moreover, emerging post-Fordist paradigms pose difficult challenges to the founding concepts on which twentieth-century industrial relations were constructed.

This starting-point is important beyond its basic reminder that although the ILO's decent work vision applies to all workers, effective recognition of the right to collective bargaining is a "good" that remains merely an aspiration for many. In a limited number of countries, collective bargaining has been the principal means by which terms of employment are set; in other countries at the other end of the spectrum, collective bargaining is accessible only to a small number of workers. In most countries, moreover, those excluded from the effective exercise of collective bargaining rights include a disproportionate number of workers hailing from groups traditionally discriminated against on grounds including race, sex, religion, and national extraction, as listed in Convention No. 111.

Unequal access to collective representation is thus doubly problematic, because it challenges the internal "effectiveness" of collective bargaining and because it reinforces and potentially deepens inequality faced by groups traditionally discriminated against. As a result, inequality of access to collective representation is a challenge to arguments that privilege traditional collective bargaining mechanisms, particularly if the mechanisms involved favour the most privileged workers to the detriment of the least privileged.

This article explores the uneasy coexistence between equality at work, broadly understood, and the cardinal emphasis in the ILO Declaration on the need for recognition of the right to collective bargaining to be "effective". It will be argued that, with due regard to their application to varied social contexts, collective bargaining frameworks are not equality-neutral; rather, the choice of collective bargaining framework can be crucial in determining whether systemic obstacles to equality of

access to collective bargaining can be removed. Moreover, in an increasingly complex, integrating world, special care needs to be taken to cultivate new sites for social dialogue, sites that ensure representation for traditionally marginalized or excluded groups.

The article also examines situations in which workers do exercise their fundamental rights to freedom of association and to bargain collectively, in order to consider another level of interface with the fundamental right and principle of equality: the interaction between collective bargaining, the majoritarian mechanism for workplace governance; and the structurally "minority" position of equality-seeking groups in many workforces. It considers the controversial but real possibility that one fundamental principle could in fact impede the effective recognition of the other. Despite this possibility, the conclusion is advanced that collective bargaining, whose rationale is deeply rooted in notions of social justice, egalitarianism, democratic participation, and freedom, holds great potential to enhance equality. However, in order to fulfil the equality mandate, collective bargaining must be grounded in a demonstrable commitment on the part of the social partners to promote equality, a commitment evident not only in the provisions of agreements, but also in how "representation" itself is constructed, and how bargaining takes place.

Finally, to the extent that the State privileges collective bargaining as the vehicle for private ordering of workplace relationships, it has a cardinal role to play in ensuring that collective bargaining enhances rather than impedes equality concerns. The final part builds on the industrial relations literature on the public–private dichotomy, emphasizing the pluralist nature of labour relations through which state enabling mechanisms permit the social partners to evolve agreements to govern their workplace. It posits the need for a regulatory environment that reduces barriers to access to collective bargaining, that sets parameters to prohibit discriminatory collective bargains, and that leaves room for collective bargaining's democratic participation mechanisms to achieve equality goals.

Unequal access to collective bargaining

Unequal access to collective bargaining is a challenge to equality. This broad view of equality draws upon the deeply egalitarian convictions that characterize the quest for social justice within the world of work. It also focuses on the purpose of protection against discrimination,[3] namely to affirm the equal worth and dignity of all human beings.

[3] This purposive approach is mandated by Art. 31 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 Mar. 1986.

It seeks to ensure that equality, whose fundamental nature is recognized within the ILO's normative universe and beyond, is also a reality in working people's lives. A purposive approach is required given the mandate in the ILO Constitution and in its normative system to include all workers, thereby affirming their equal worth and dignity. Unequal access to collective bargaining represents a major challenge to equality, one that the Declaration calls on the ILO and its constituency to address.

Exclusionary implications of the Fordist paradigm

In the design and application of machinery to give effect to the right to collective bargaining, certain categories of worker were forgotten, overlooked or quite simply excluded because they were not part of the dominant paradigm. Such discrimination is systemic, in that it is embedded in social and institutional practices, policies or rules. As the dominant paradigm has shifted, the inequalities have deepened because the vehicles to render collective bargaining effective failed to capture the increasingly plural workplace realities. Moreover, the workers excluded from the actual scope of collective bargaining tend also to be from groups traditionally disadvantaged on the basis of race, gender, disability and other prohibited grounds of discrimination.

Most collective bargaining systems developed and refined over the twentieth century sought primarily to respond to the regulatory challenges of industrial production workplaces. Collective bargaining mechanisms tend to include relative degrees of recognition of (often constitutionally enshrined) freedom of association, including protection against reprisals for trade union membership. The recognition is often buttressed by mechanisms to ensure that collective bargaining is legally recognized (in voluntarist traditions, by dislodging the common law presumption that they are illegal). Recognition may occur at several levels, and may change with the form of production from enterprise level, industry level, national level, and more recently (and exceptionally) transnational or regional level (Moreau, 2002, pp. 391-392). Whether they were premised on decentralized collective bargaining based on democratic participation at the individual workplace or enterprise level, or on more centralized structures emphasizing broader notions of industrial citizenship in social policy, the collective bargaining systems that came to predominate are commonly captured within the framework of the Fordist paradigm.

The broad contours of Fordism are well known, so the details will not be rehearsed here.[4] Fordism functioned in an era of mass production in large workplaces, which spurred on an industrial model of employ-

[4] For a discussion of the tripod of Fordism from the regulation school account, see Lipietz (1994), pp. 341-342.

ment. It combined with Taylorist scientific management approaches, leading to industrial de-skilling, since the components of any given production process could be broken down into individual repetitive tasks that most labourers could perform; their execution could be timed and monitored by employers along an assembly line. Since employers and workers were likely to be based in a given factory located within the same country for which production was destined, the workers were essentially also the consumers. Consequently, there was incentive for employers to pay workers good, rising wages, to enable them in turn to buy the products that they produced. They also needed leisure time so that they could exercise their purchasing power, and consume the goods they bought. These workplace gains were consolidated by Keynesian macroeconomic policies that encouraged governments to spend in the creation of a welfare state. Liberal economic policies were increasingly embedded in society (Polyani, 1957; Ruggie, 1982).

It is increasingly acknowledged that even at the height of industrialization, models built on Fordism could not capture the full range of workplace organization. Basic regulatory mechanisms, particularly in the industrial relations system prevalent in the United States and Canada (the Wagner Act tradition), simply excluded certain categories of workers from legislation recognizing freedom of association and the effective right to bargain collectively. Employment in agricultural and domestic settings was routinely excluded, on the assumption that the work "naturally" fell outside the industrial model, sometimes quite literally because of the absence of an industrial work*place*.[5] In some ways, this "natural" exclusion parallels the exclusion in practice of small workplaces, which have traditionally been quite difficult for unions to organize (Olney, 1996), and in which many historically marginalized groups have tended to work. More telling today is the inability of many excluded categories to make effective use of their freedom of association and right to bargain collectively when these are granted by legislative mechanisms that merely include these workers, without taking their specific workplace organization into consideration.

Like the broader regulatory and distributive systems encapsulating them, collective bargaining systems of the Fordist era were also national in scope. They took the nation-State and state sovereignty as given, and operated within those confines. Even as accumulation exceeded the consumption capacities of individual States, and trade in goods and foreign direct investment became essential to sustain the mode of production,

[5] Organization of these categories of workers has been more successful in some countries (e.g. France) than others (e.g. Canada). For domestic workers in most countries, the gulf between legislative inclusion and *de facto* access to collective bargaining remains particularly wide.

national borders were carefully guarded to protect workers in industrialized countries from migrant workers prepared to accept working conditions less favourable than those enjoyed by the nationals. Prevailing occupational segregation of immigrant workers and racial, ethnic and religious minority workers in formal workplaces with low levels of organization or in the informal economy further limited these workers' access to collective bargaining.

In contrast, productive relations existing outside a particular nation-State were not considered to fall within the distributional range with which the social partner in a given country should be concerned. Along with protective legislation, collective bargaining preserved and enriched gains within – but not beyond – a given State. Despite classic justifications based on citizenship rights to share in the fruit of citizens' productive participation and to exclude non-citizens,[6] the national scope of distributive justice increasingly failed to capture the reality of production that crossed national borders, necessarily delinking itself from consumption.

Certainly, many fictions of Fordism have resulted in a number of *de facto* exclusions from the effective recognition and exercise of collective bargaining rights. One was that women did not have to work because men were the family breadwinners. Though women had worked outside the home long before, throughout, and since the height of Fordism, their work was mostly in precarious conditions and for low wages; they were a reserve labour force to be drawn upon when men were not available. Accordingly, there was no need to pay women a family wage, as men were the breadwinners. Women were also penalized in that social benefits were often tied to employment, so the male breadwinner also controlled access to social safety nets, including health benefits and retirement pensions. In other cases, particularly workers from disadvantaged groups, workforce participation occurred in the ghettoized occupations perceived to be their proper sphere (Malveaux, 1992).

In its preoccupation with production, Fordism excluded women's reproductive work, as well as the associated "non-productive," "invaluable" labour of love in the home, assumed to be without value in the labour market . When the wife/mother's labour was replaced, the work was performed by women (and some men) from disadvantaged groups – earlier through slavery or indentured servitude, later through restrictive migration schemes or bonded labour. Thus, the inadequate value attributed to the work was reinforced (Gaitskell et al., 1983). It is a testament to the depth of this dichotomy that domestic work is traditionally excluded from many collective bargaining systems (Blackett, 1998, pp. 12-15; Vega Ruiz, 1994). The exclusions, coupled with the limits placed on

[6] The classic assumption of the national scope of many distributive justice claims is increasingly contested in academic literature. See Young (2000), pp. 236-243.

women's participation even when they are unionized, compound the exclusionary effects (Lester, 1991; Swinton, 1995; Wedderburn, 1997).[7]

Another fiction of Fordism was the presumed homogeneous society. Traditional Fordist accounts failed to acknowledge the labour market segmentation of racial, ethnic and religious minority workers in industrialized societies, as well as that of immigrant workers, who were often relegated to less desirable, comparatively low-status jobs. Certainly Fordism's egalitarian focus on scientific management – emphasizing transparency in job classifications, requirements and pay levels – supported the contention that collective bargaining was amenable to general principles of non-discrimination. In some contexts, racial minority groups were granted (limited and uneasy) access to the waged labour market and to unionization, although this access was insufficient to prevent racial and related forms of discrimination once employment with access to collective bargaining had been achieved (Jones, 1992, p. 53; Marable, 1982).[8] The workers' minority status in society and in many industries, as well as their segmentation in less desirable occupations and industries, is reflected in (and reflective of) their comparatively limited bargaining power.

In other primarily developing countries, racial, ethnic, religious (and in some cases linguistic) equality is linked to struggles against colonial control over economic and political life (Bolles, 1996). Many trade unions emerged as central social actors in the newly independent States, and played a leading role in promoting broad structural societal change to reverse entrenched racial segregation. However, little attention has been paid to the ways in which racial, ethnic and religious heterogeneity in the country may have influenced access to employment and collective bargaining.

Social partners have found it difficult to identify ways in which collective bargaining can help eradicate systemic racial inequality, probably because of the conceptual difficulties associated with racism, discrimination on the basis of ethnicity and religion, and the relative lack of power of historically disadvantaged groups to influence collective bargaining.

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[7] Swinton (1995, p. 727) challenges the perception that adversarial approaches to collective bargaining are necessarily barriers to access for women, by remarking on the degree to which women have embraced collective bargaining in its traditional form, particularly in middle-class occupations that are predominantly female in many countries, such as nursing and elementary school teaching; Lord Wedderburn (1997, p. 7) emphasizes the importance of contract administration, or co-regulation, after an agreement has been reached, whether by aggressive or more cooperative means.

[8] Marable (1982, p. 156) adds that the crisis was exacerbated by the fact that many African American workers occupied the jobs most likely to be eliminated with the coming of greater technological innovation and outsourcing of labour.

There has been a lamentable dearth of material analysing the connections between discrimination and collective bargaining.[9] Although it is valuable to analyse and comment on new forms of discrimination, it is crucial to ensure that old forms, such as racial discrimination, continue to be addressed (Hodges-Aeberhard, 1999; Hodges-Aeberhard and Raskin, 1997).

Fordism also assumed away other divergences from the "norm". Thus, job applicants with disabilities were simply not hired; "accommodation" of persons with disabilities, by modifying the workplace or enabling the worker to undertake different tasks or the same tasks differently, came much later. Workers who developed work-related disabilities sometimes simply lost their jobs after prolonged absence from work. Entitlement to some limited compensation, through long-term disability pay and to some extent accommodation through more flexible approaches to otherwise rigid seniority and job classification systems, was only gradually achieved. Production schedules were organized in shifts; although those shifts recognized dominant norms (e.g. Sundays off in traditionally Christian societies), the religious beliefs of workers outside the dominant social groups were not readily recognized and accommodated. In their emphasis on transparency through "colour-blind" seniority and merit-based job classification, Fordist hiring, promotion and disciplinary practices were potentially able to foster greater racial and ethnic integration rather than accentuating difference. Yet in fact workers from the dominant social groups benefited disproportionately from these facially neutral rules and for many reasons, including past discrimination, hostile work environments, harassment, job segregation based on traditional roles for women, interruptions for child-rearing and recent workplace attachments linked to immigration status. In particular, systemic discrimination resulting in labour market segregation and in some cases in exclusion from the labour market meant that workers from certain racial or ethnic groups were effectively excluded from access to collective bargaining that recognized their rights and interests.

The categories of worker who tended to be excluded, expressly or implicitly, during the Fordist era largely correspond to the categories enumerated in Convention No. 111 as requiring protection from discrimination (Zeytinoglu and Khasiala Muteshi, 2000, p. 141). As noted above, domestic workers are predominantly women from racial and

[9] The ILO has played a leading role in the fight against racism, notably through its principled position towards apartheid in South Africa and its constructive role in facilitating transition through labour regulatory mechanisms developed for the post-apartheid context. It should continue to provide focused insight into the vexing question of how to help the social partners to recognize, admit, confront and challenge racial, ethnic and religious discrimination in order to promote racial, ethnic and religious equality in the use of collective bargaining mechanisms. While attention to particular categories of atypical or informal-sector workers may indirectly address some of these concerns (e.g. ILO, 2002a), more targeted analysis and attention to discrimination against these historically disadvantaged groups is urgently needed.

other minority backgrounds; to exclude (in law or on a *de facto* basis) domestic work from the reach of collective bargaining has a particularly marked impact on these vulnerable women. Similarly, agricultural workers, notably in industrialized countries, are disproportionately racial minority and foreign workers; therefore their exclusion from collective bargaining legislation in some countries has a disparate impact in terms of race, national and ethnic origin. Workers in the informal economy, atypical, part-time and precarious contractual workers, and workers facing occupational segregation are predominantly women, workers from racial, ethnic and religious minorities, immigrants, workers with disabilities, and young people.[10]

Moreover, even if all the express exclusions from collective bargaining regimes were reversed, this would not solve the problem of unequal access to collective bargaining, because access to trade unions and collective bargaining is much more difficult in certain sectors of the economy. Workers' inadequate bargaining power is an important explanation for the difficulty of unionizing workers in certain sectors. Even if unions manage to secure a foothold within a particular workplace or industry and begin collective bargaining, they often encounter a second layer of difficulty in negotiating favourable working conditions. If the union cannot achieve any significant gains through collective bargaining because of inadequate bargaining power, of course, its support will gradually wither away.

Where the legal and socio-economic realities of certain kinds of work render collective organization difficult and where workers lack sufficient bargaining power despite being organized, collective bargaining reveals its limited ability to ensure equality at work. Indeed, it may even accentuate the gap between workers with effective bargaining power and those without it (Beatty, 1983).

Effective recognition of the right to collective bargaining: A commitment to equality

If traditional collective bargaining regimes exclude certain categories of worker, the question inevitably arises as to whether the right to collective bargaining is effectively recognized. It is our assertion that the term "effective" must be understood in a way that is sensitive to the interface between fundamental principles and rights at work. In other words, collective bargaining mechanisms cannot be considered to be effective if they structurally exclude from access to collective bargaining those disadvantaged workers to whom Convention No. 111 guarantees equality. To some extent this is also a challenge to traditional arguments

[10] Young workers from historically disadvantaged racial groups are particularly vulnerable. See Wrench, Rea and Ouali, (1999); and K. Jennings (1992).

that favour certain collective bargaining frameworks over others. To be effective, collective bargaining mechanisms must be fully inclusive, particularly of those workers who have faced historical disadvantage of the kind that Convention No. 111 strives to eliminate.

The effective recognition of the right to collective bargaining is embedded in a robust conception of freedom of association that reaffirms the need for democratic governance to infuse working peoples' lived experience. As a vehicle for achieving and promoting dignity at work, it reflects both the process and the opportunity of freedom, which are integral to the cross-cutting goal of development (Sen, 1999a, p. 17; Langille, 1999). Linking freedom of association with effective access to collective bargaining not only recognizes rights and freedoms, but also gives participants the means, or "voice", through which to make their needs known, and in a way that enables the social partners to seek to meet those needs within and beyond the workplace. The empowering capacity of freedom of association and of the right to bargain collectively is part of a broad conception of freedom, recognizing that "protection" cannot simply be conferred; rather, stakeholders must play an integral role in articulating their own needs. Like other rights, freedom of association and collective bargaining are "not only pivotal in inducing social responses to economic needs, they are also central to the conceptualization of economic needs themselves" (Sen, 1999a, p. 154).

For these reasons, the broad definition of collective bargaining found in ILO Convention No. 98 is entirely consonant with ensuring that workers have a say in the decisions that matter to them; accordingly, the ILO has applied the principle "in an uncompromisingly broad manner, albeit one that recognizes a wide diversity of industrial relations systems" (Blackett, 1999, p. 15). Indeed, in its concern for promoting social justice, the ILO has championed the companion notion of social dialogue, embracing autonomous participation by tripartite constituencies in a broad range of economic and social policy-making activities, notably at the national, transnational and international levels. This form of tripartism is rooted in "the acceptance of societal pluralism" (Trebilcock, 1994, p. 7).

The fact that the ILO situates the fundamental freedom of collective bargaining within the broad framework of social dialogue illustrates the ILO's commitment not to a particular regulatory vehicle, but to ensuring that the underlying democratic principle of workers' participation through their freely chosen representatives is safeguarded. For the great diversity of industrial relations systems reflects the great diversity of legal traditions and regulatory frameworks around the world (Glenn, 2000). Whether industrial relations frameworks were received and implemented with success may mirror the relative effectiveness with which broader regulatory frameworks were received, particularly in develop-

ing countries and transition countries. Yet there is an added dimension in the labour regulation area. Regulatory mechanisms for the effective recognition of the right to collective bargaining are largely premised on the existence of a significantly industrialized economy, so transplanting the models to parts of the world where industrialization is just beginning virtually guarantees an uneasy coexistence. The mechanisms must not only be adjusted to the existing legal, political, and socio-cultural context, but also to the mode of organization of the local labour market. Therefore, a system that ensures effective recognition of the right to collective bargaining in the advanced industrial country where it originated may prove able to ensure only weak recognition of the right of collective bargaining in less industrialized countries.

This problem is of considerable concern in developing countries and in the more fragile transition economies. Because the formal sector is small in these countries, the number of workplaces in which collective bargaining can be applied is limited. Not surprisingly, therefore, collective bargaining tends to be restricted to the public and semi-public sectors of these countries, excluding most workers. Consequently, traditional collective bargaining mechanisms have been ineffective at reaching most workers in many developing countries, thereby compromising equality of treatment.

Economic restructuring and the growing gap between collective bargaining and equality

Economic restructuring raises challenges for the interface between collective bargaining and equality that can no longer be readily ignored. The difficulties of access to collective bargaining experienced in many parts of the developing world and faced by disadvantaged groups in industrialized countries are increasingly felt by mainstream workers in industrialized and newly industrialized countries. As Manuela Tomei has argued in her description of the "new heterogeneity of informality":

> Neither "atypical" forms of employment nor the "informal" sector can be viewed as residual categories any more; they are rather integral to the overall development dynamics. Quality of employment varies along a continuum which does not follow the dichotomy formal/informal. Not all jobs in the informal sector are necessarily of poor quality nor do all formal sector jobs qualify as good jobs. Insecurity of tenure, job precarity and irregularity, lack of or limited social protection are increasingly common features of formal activities as well (Tomei, 1999, p. 1; see also Lamarche, 1995, p. 126).

Mainstream workers find it increasingly difficult to resist downward pressures on their negotiated gains. Their labour rights attained in part through collective bargaining and social dialogue are increasingly

considered to be anti-competitive costs inefficiently allocated through the monopolistic behaviour of unfairly favoured interest groups (Bronstein, 1997). There have been limited attempts at labour relations reform, but the basic Fordist premises of collective bargaining systems have not been comprehensively revised. Failure to counteract downward pressures may exacerbate discrimination and discourage attempts to promote equality, particularly in negotiating contexts.

A cardinal example of the changes affecting industrialized and newly industrialized countries is the shift away from a production-based economy to a much-expanded service economy with technology-driven growth. The rapid development and proliferation of new technology have brought about marked changes in the nature and organization of work (Radé, 2002, pp. 33-34). As a result, more workers hold levels of responsibility and control that limit their right to organize under certain domestic labour laws. A system of rigid job classification with fixed, clearly identifiable job requirements has yielded to one where multi-skilling, teamwork and "life-long learning" are increasingly expected (Barenberg, 1994, pp. 881 ff). In particular, life-long learning implies workers' ongoing training and career changes undertaken not only for their own interest but also to ensure their flexibility and therefore continuing "employability" (Standing, 2002, pp. 166-167). These changes shake up conventional understanding of the paradigmatic worker (Olney, 1996, p. 41), while reducing the ability to rely on fixed, apparently objective criteria to determine "merit". They leave room for more subjective criteria in hiring and promotion practices, while making the ability to fit within a particular dominant cultural norm more explicit. These new requirements may also have adverse effects on equality.

Though territorial borders no longer matter in the ways that they did in the Fordist era, they have been crucial in the development of clusters of particular economic activity and of an intricate web of niche-based service relationships. Consider that primarily young, female offshore telemarketers with impeccable French-language skills based in North African countries with strong telecommunications infrastructures, notably Morocco and Tunisia, can work remotely delivering their virtual services to consumers in France (*Le Monde*, 2004a, 2004c). More supple regulatory frameworks may contribute to the performance of this work on an atypical, contingent basis (*Le Monde*, 2004b) These conditions do not facilitate conventional workplace organization .

Even the cornerstone notion of production, initially most amenable to mid-twentieth century views of collective bargaining, has changed so dramatically that Fordist assumptions no longer readily apply. Broadly characterized as the new international division of labour, flexible systems of accumulation have developed through which corporations outsource production to smaller producers and component assemblers around the world (Harvey, 1989). These fragile micro- and small enter-

prises linked to a complex web of supply networks are a new and dynamic source of employment along the global production chain that further complicates the informal/formal sector divide in much of the developing world. There are many accounts of exploitative labour practices in those workplaces; the much feared but empirically unverified assumption of a "race to the bottom" has itself fostered a form of regulatory chill that defies more rigorous analysis (Kucera, 2002, p. 31; OECD, 1996, pp. 80-82; Barenberg, 1996, pp. 117-118; Paul, 1995, pp. 29-30; Trebilcock and Howse, 1999, p. 445). Applying enforceable, socially just rules across territorial boundaries to individual workplaces, thereby linking plants around the world with distant multinational enterprises and the consuming public, represents a formidable challenge, especially if it involves ensuring that these new regulatory initiatives do not "run the risk of supplanting rather than buttressing democratic participation in the workplace" (Blackett, 2001a, pp. 420-421).

In the increasingly post-Fordist economy, management and ownership structures in the public and para-public sectors have been changed to promote flexibility (Yemin, 1993, p. 476). Indeed, in the United Kingdom and New Zealand, as noted in Ozaki (1999), "the flexibilization of employment contracts in the public sector preceded the rapid spread in the 1990s of flexible employment in the private sector" (p. 8) even though public-sector reforms were initiated on the basis of "an imagined vision of the private sector" (ibid., p. 8). These changes were observed particularly in many developing and least-developed countries that had experienced structural adjustment intended to ensure flexibility in the formal sector, itself quite small (Lachaud, 1993). The changes have tended to reduce workers' capacity to engage in collective bargaining in sectors with traditionally high levels of relatively effective collective bargaining. Some democratic governments in developing and industrialized countries have tried to lead by example by implementing employment equity programmes; however, since the workers from disadvantaged groups who may be hired tend to have the least seniority, they may also be the first to lose their employment when contracting out and other flexible employment practices are introduced (Swinton, 1995).

Of course, privatization and new public-sector management strategies are not invariably problematic as regards non-discrimination in employment, occupation and the right to collective bargaining. Indeed, democratic governments have long drawn heavily on public procurement schemes to enforce employment-equity goals on private contractors bidding for government contracts; theoretically, equity objectives could be attached to more contemporary forms of contracting. Yet the transition from secure unionized work, predominated by workers from dominant social groups to individualized, precarious forms of employment, predominated by disadvantaged groups, (Zeytinoglu and Muteshi, 2000) is at the crux of the issue (Spyropoulos, 2002, pp. 391-392).

The contracting-out issue illustrates why the impact of unequal access is not system-neutral. Industrial relations systems that restrict the scope or duration of collective bargaining over contracting out may contribute to the loss of collective bargaining rights in the sectors concerned. Systems that require information-sharing, consultation and negotiation over restructuring may reduce the impact of the resulting changes. Meanwhile, other approaches to privatization may have a direct effect on workers' standard access to collective bargaining machinery. For example, initiatives to privatize a range of equality-enhancing public services, such as affordable childcare, may actually complicate access to the labour market for workers with family responsibilities, and minimize their ability to participate meaningfully in workplace governance through collective bargaining.

Negotiating equality at work

It is sometimes suggested that collective bargaining is concerned with industrial and economic issues, whereas human rights and equality are concerned with social issues (Curtin, 1999, p. 22). Human rights questions should be addressed through legislative reform; and economic questions are the appropriate focus of collective bargaining (Kumar and Murray, 2002, p. 14). However, the conceptual divide between the economic and the social is narrowing and the connections between the two emphasized. While legislative reform to advance human rights protection is essential, particularly given the limited extent of unionization, legislation should reinforce rather than undermine the role of collective bargaining in the human rights domain. Moreover, human rights are involved in basic economic issues – wages, restructuring, contracting out, the rise of atypical work, job security, workplace benefits, working conditions – which are at the heart of traditional collective bargaining. All these economic issues have serious implications for equality at work. Similarly, social issues, such as family-related leave, training opportunities, non-discrimination and protection from harassment at work, have significant economic implications.

The potential to advance equality through collective bargaining may be limited because of the restricted scope of collective bargaining. In many industries and workplaces, collective bargaining does not cover employment issues central to equality and non-discrimination, i.e. recruitment, promotion and training (Colling and Dickens, 1989, p. 3). In some countries, collective bargaining focuses on wages and employment benefits rather than on work organization. There have been divisive debates about management rights and the appropriate scope of collective bargaining (Langille and Macklem, 1988). Does the collective bargain simply replace the individual contract of employment or does the collective bargaining process usher in a fundamental shift in all work-

related decision-making, and constitute a form of co-determination, a new constitutional framework for the workplace, a new workplace rule of law? Though collective bargaining may accurately be described as limited in scope and as focusing on wages and benefits, it could potentially address all aspects of life at work, including those at the heart of equality at work.[11] As a means of ensuring worker participation in a range of issues affecting working people's lives and of advancing fairness, respect and well-being, collective bargaining is directly relevant to equality at work.

Tension between majority interests and minority rights

Paradoxically, collective bargaining has been both part of the problem and part of the solution to the elimination of inequality and discrimination at work. Collective bargaining usually reflects the priorities and needs of the dominant workers in a particular workplace or industry. In some instances, the problem is one of omission or failure to include on the collective bargaining agenda issues of concern to workers from under-represented groups (e.g. women, racial or religious minorities). This may still be true even when, because of the segregated nature of labour markets, most workers at a particular workplace actually belong to an historically disadvantaged group. In other cases, direct conflicts emerge between the provisions of collective agreements and the need to accommodate differences and be attentive to human rights. There are examples of trade unions "utilising the ideology of racism and actively colluding with employers to restrict the job opportunities" of racial and ethnic minority workers (Virdee, 2000, p. 210). When faced with unemployment and lay-offs, trade unions have sometimes endorsed racist and exclusionary anti-immigration policies (Wrench, Rea and Ouali, 1999, p. 14; Pasture, 2000, p. 8; Pasture and Verberckmoes, 1998). Similarly, when female workers were viewed as a threat to the employment opportunities of male workers, male-dominated trade unions embraced the family wage and separate-spheres ideologies in order to limit employment opportunities for women (Crain, 1989 and 1992; Briskin and McDermott, 1993; Curtin, 1999). Despite the changes undergone by many workplaces, collective bargaining priorities have not always been adjusted accordingly, resulting in conflicts between traditional trade union demands and the needs of workers who do not correspond to the traditional worker profile.

Debates about the merits of equality rights versus seniority illustrate the potential risks of majoritarianism. Originally, the allocation

[11] For a critique of the contractualist focus of trade unions, see Collins (1986).

of workplace benefits and opportunities based on seniority (or length of service) was based on the idea that the approach would advance fairness, protect against favouritism or arbitrary management decisions, and ultimately benefit everyone equally because each employee eventually built up seniority over the years (Sheppard, 1984). The application of seniority rules in the modern economic context, however, does not always advance fair and equal treatment of women and minority groups for one important reason: equal access to employment does not exist, and so women and minority workers often build up considerably less seniority than do majority male workers. Thus, seniority rules can both accentuate the effects of past exclusion and reinforce the privileges of "insiders" – privileges too often built upon the discriminatory exclusion of "outsiders" (Williams, 1991, p. 101). However, criticizing the seniority system appears to open the door to greater managerial discretion in the allocation of jobs, benefits and promotion. It is important therefore to criticize the discriminatory effects of seniority, while developing creative alternatives that respect the positive aspects of seniority systems, for example, by specifying exclusions to the application of seniority provisions in order to accommodate workstation changes and facilitate job opportunities for disabled workers (Wiggins, 2000, p. 33).

The potential conflict between majority interests and minority rights is sometimes seen as a parallel to that between collective and individual rights. Equality rights are perceived in terms of individual rights while collective bargaining is seen as a mechanism for the pursuit of collective or social goals (Sen, 1999b and 2000). Collective struggles to end discrimination in the workplace have been hampered by this dichotomy, according to some scholars who consider that civil rights laws have focused on individual rights while labour laws have advanced group rights (Yates and Mason, 1999, pp. 97-98). The cogency of this distinction is questionable. As regards discrimination, in particular, it is the group aspect of the unfair treatment that brings it under the rubric of equal rights. Though equal rights are often evoked by individuals, they are closely linked to group rights. Moreover, a growing literature on equality rights emphasizes the systemic and relational aspects of discrimination (Minow, 1990). Rather than locating problems of exclusion and discrimination in the individuals or groups who experience inequality, they are understood to result from the social and institutional consequences of not conforming to dominant norms. For equality to be achieved, therefore, institutional change must occur such that the lives of both the minority and the majority are transformed and enriched. Finally, though trade unions have not always advanced women's or minority group rights in the workplace, they have done so on a number of occasions. Indeed, in some contexts, without trade union advocacy and the collective pursuit of human rights claims (e.g. pay equity or comparable worth), there would be virtually no protection or enforcement of human rights.

Inclusive democracy: Participation of equality-seeking groups in collective bargaining

The key response to the omission of the concerns and needs of historically disadvantaged minority groups from collective bargaining is to ensure these groups' inclusion in the collective bargaining process. For collective bargaining to enhance equality, individuals from such groups must be consulted about their needs and interests and must be represented at the bargaining table. In this regard, it is helpful to learn from important research on gender equality and collective bargaining, which consistently highlights the need to include women workers in the collective bargaining process (Curtin, 1997, p. 203).

Equitable representation within union decision-making structures and equality-enhancing union policies are repeatedly identified as prerequisites for advancing equality through collective bargaining (Curtin, 1999, p. 26; Bercusson and Dickens, 1998). Not only does this validate the experience, knowledge and insights of those who live the realities of exclusion and discrimination, it also enhances collective bargaining's inclusive function enabling the democratic participation of all workers, not simply those who represent the majority in a particular industry or enterprise.

When voicing their specific needs and interests, historically disadvantaged groups have not always been encouraged to claim their rights because of trade union fear that this would undermine worker solidarity. Some have argued that "identity politics" (Young, 2000)[12] risks undermining unified class-based perspectives (Fudge and Glasbeek, 1992). Others have suggested that the integration of trade union representatives in national policy-making has too often been "predicated upon the homogenization of the heterogeneous demands of workers" (Curtin, 1999, p. 23). Nevertheless, there has been growing recognition that the very varied interests and needs within the labour movement deserve to be articulated and addressed.[13] Indeed, some have argued that, far from being undermined, solidarity can be strengthened by recognizing diversity (e.g. Harris, 1990). Effective participation is essential to understand the nature of inequality and to identify creative solutions that can be advanced through the collective bargaining process.

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[12] See Young (2000) who criticizes the tendency to reduce the claims of equality-seeking groups to identity politics, explaining that "the primary form of social difference to which the movements respond … is structural difference, which may build on but is not reducible to cultural differences of gender, ethnicity, or religion. … Claims of justice made from specific social group positions expose the consequences of … relationships of power or opportunity" (pp. 86-87).

[13] For example, the idea that unions can encourage and teach their most vulnerable members to adopt a "name, blame and claim" approach to violation of a basic right or discrimination (ILO, 2002a, p. 11).

Beyond the need for consultation with individuals and groups with experience of discrimination, research on gender equality and trade unions emphasizes the importance of training individuals from under-represented groups to participate in trade union activities and collective bargaining (Government of Australia, 1994a). Here, insights from the gender domain are pertinent to other disadvantaged groups. Democratic participation in trade union activities and involvement in other workplace-related questions require individuals to know how to operate effectively within the union and at the workplace. Without direct training and education, this may remain beyond the reach of many women workers and minority workers.

Furthermore, if workers from disadvantaged groups are included in negotiating teams and are chosen to participate in collective bargaining, this will help reduce the risk of the needs and concerns of minority groups becoming marginalized during the collective bargaining process. It is particularly useful to have representatives of a minority community who are able to consult effectively with their group. It is also important to ensure that those elected properly reflect the diversity of the workforce they represent, so that leadership positions are shown to be accessible to all.

Questions of representation of diverse interests and groups are complex. How should the various groups be defined? To what extent can individuals from groups historically subject to exclusion and disadvantage at work represent their own group's interests? For membership of a particular group does not necessarily mean that one holds the same values or ideas as others in that group (Phillips, 1991). How can one guard against problems of tokenism and the legitimation of inequality through an unequal structure of group representation (Mahon, 1977)? Moreover, consultation and participation are only effective if there is an audience willing to listen to and take seriously views and voices that are usually silenced or marginalized (Sheppard and Westphal, 2000, pp. 345-346).

Ensuring that the interests of historically disadvantaged groups are not traded off in the heat of collective bargaining is another challenge. Human rights legislation can play a significant role here, by setting a non-negotiable floor of human rights protection, which both employers and unions must respect. Collective bargaining can then focus on how best to implement human rights guarantees, rather than requiring the parties to bargain about what should be non-negotiable, namely, respect for the rights of equality-seeking groups.

Equality and the content of collective agreements

The pursuit of substantive equality engages employers, unions and workers in a process of institutional and social change, requiring a funda-

mental rethinking of the world of work to open it up to diversity. Yet, significant change is not always easy to accomplish through collective bargaining because of the latter's adversarial nature and given resistance to changing policies or practices that may challenge hard-won gains, even when these no longer create an inclusive atmosphere in the workplace. Three key aspects of the pursuit of substantive equality through collective bargaining may be identified: a commitment to equality; mechanisms for identifying inequality and discrimination; and creative remedial measures and strategies.

Commitment to equality

For equality to be advanced through collective bargaining, trade unions and employers must be committed to the idea. At different times in the past, trade unions have not consistently aligned their interests and commitments with those of women workers and workers from minority groups. Nevertheless, trade unions are now according higher priority to equality questions at the bargaining table. Gender equality has been a particular focus of trade unions' concern. Although racial inequality has deep historical roots and has caused enormous harm, trade unions have only recently begun to make policy statements denouncing racism and endorsing solidarity across racial, ethnic and religious differences (see, for example, CLC (1998), p. 4). In recent years, collective bargaining has been relied upon to advance the equal rights of social groups that were not traditionally protected by anti-discrimination laws. The private ordering dimensions of collective bargaining, whereby the parties themselves negotiate anti-discrimination protection, are particularly important for these groups in the absence of legal and legislative reform (Sweeney, 2001, p. 29; CLC, 1994). For example, a growing body of research endeavours to document and compare, across nations, the actions taken by organized labour in relation to sexual diversity issues (Hunt, 1999). Innovations in the area of disability rights have also been advanced by trade unions (Wiggins, 2000, p. 26).

With respect to trade union commitment to equality, two observations deserve mention. First, research suggests that when trade unions accord high priority to equality concerns in negotiations, these are much more likely to be met. A recent study concluded that "newer items are unlikely to be achieved unless they are high-priority items. It would appear that policy does make a difference and that there is real scope for proactive policy stances" (Kumar and Murray, 2002, p. 24). Second, trade unions' commitment to equality is threatened by an external environment characterized by "increased domestic and international competition and new management strategies" (ibid., p. 5) favouring cost-cutting (including closures and mergers), downsizing, outsourcing, use of temporary and part-time workers and privatization. It has been suggested that much less importance is likely to be accorded to equality during periods

of economic recession, restructuring and insecurity (Wrench, Rea and Ouali, 1999, p. 14).

Employers' commitment to equality is also critical. The chances of achieving equality through collective bargaining are greatly enhanced if commitment is secured from both parties. Moreover, it is important to identify the impact on equality of management strategies adopted in the face of intensified global competition. These often have human rights implications because of their disproportionate impact on vulnerable and socially disadvantaged groups. Although employers sometimes argue that the costs of equality are an obstacle to change, it is increasingly being recognized that the costs of inequality are enormous.

Mechanisms to identify inequality and discrimination

When preparing for collective bargaining and setting their bargaining demands and priorities, both unions and employers should include an assessment of existing problems of inequality and discrimination. It is essential to involve historically excluded and disadvantaged groups in the identification of problems of inequality. When technical knowledge is needed to analyse systems and statistical patterns of exclusion and discrimination (e.g. pay equity), the collective expertise of trade unions and human resource departments can make an important contribution.

There is also a need to set up ongoing mechanisms to identify systemic and policy problems of inequality in industrial relations systems that set a limited timeframe for collective bargaining. In some collective agreements, equity, accommodation or human rights committees are established, with management and worker representatives, to monitor existing equality initiatives, identify new problems and recommend policy and workplace changes. Monitoring has been identified as a critical component of effective equality policies (Dickens, 1998, pp. 14-16). It is important to ensure that industrial democracy and collective bargaining reinforce rather than undermine each other. Some research suggests that worker democracy initiatives are in fact more likely to develop in unionized workplaces; earlier research had sometimes linked industrial democracy and quality of work initiatives with efforts to discourage unionization (e.g. Frohlich and Pekruhl, 1996). As discussed below, legislative initiatives to advance equality in pay equity and employment equity often give an important implementation and monitoring role to trade unions, as the autonomous voice of workers.

Creative remedial measures and strategies

Collective agreements increasingly contain general non-discrimination clauses, which prohibit discrimination in the workplace on the basis of specific grounds.[14] It is also important to include a provision spe-

[14] For a review of non-discrimination clauses in collective agreements, see Jolidon (2001).

cifically prohibiting harassment in the workplace. These clauses are significant because they affirm a consensus regarding the general normative importance of equality at work. To the extent that a collective agreement represents the rule of law for the workplace, equality must be included as a founding normative principle. Equality rights clauses may also serve as interpretive aids to other provisions in a collective agreement. In case of ambiguity or possible contradictory provisions in the collective agreement, a non-discrimination clause may reinforce interpretations that are consistent with equality.

Non-discrimination clauses vary as regards the grounds for protection which they invoke. They may mirror existing human rights legislation, incorporate human rights standards by reference, or go beyond statutory protection (which is critically important where the protection provided by the law is inadequate). While equality clauses often invoke separate group-based grounds of discrimination, individual identities tend to transcend singular grounds. Solidarity may be enhanced through an integrated approach that does not limit equality-enhancing provisions to special treatment for particular groups. Nonetheless, it is important to be attentive to the specificity of individual experience of inequality and to name those inequalities in group-based terms, when necessary.

An assessment of different collective bargaining provisions on prohibited grounds of discrimination reveals the importance of social and historical context. Discrimination has varied according to national and local political, social and economic realities. For example, in many countries struggling to overcome the effects of colonialism, trade union movements were active in the national political struggle (Bolles, 1996, p. xiv). In such contexts, discrimination on the basis of political beliefs and affiliation may have been critically important and is therefore included as a key aspect of non-discrimination clauses. In other countries, gender-based discrimination may be the focus of non-discrimination clauses and initiatives. Trade union acknowledgement of other inequalities, such as that suffered by homosexual workers, may also vary significantly depending on the national context.

The inclusion of a general non-discrimination clause in a collective agreement is particularly important to ensure protection of human rights, since alleged problems of discrimination will then be subject to a grievance procedure and, potentially, to arbitration. Indeed, there is a burgeoning arbitral jurisprudence interpreting basic human rights guarantees in collective agreements. Workers may be more inclined to file a grievance regarding discrimination than to initiate a human rights complaint or to start a civil suit alleging discrimination. Thus, access to the grievance procedure can greatly enhance access to justice in the human rights area (Vallée et al., 2001).

While grievance arbitration can help access to justice in the human rights area, it should not be the sole means of redress, for several

important reasons. First, the individual who has experienced the discrimination does not always have direct control over whether a grievance procedure goes ahead. Sometimes, a union may decide not to pursue a human rights complaint, against the wishes of the individual concerned. While legislated duties of fair representation may provide some measure of protection against arbitrary decision-making by the union, an individual should have the option of pursuing other avenues of redress (e.g. a human rights complaint). Second, arbitrators may not always have sufficient human rights expertise to solve some of the complex problems that arise in discrimination cases. More specialized human rights tribunals may be better equipped to deal with problems of inequality at work.

Though the inclusion of non-discrimination and non-harassment clauses is important, such clauses often replicate a complaints-driven model of human rights enforcement. They are interpreted and applied in the face of an individual complaint or grievance regarding alleged discrimination or harassment. It is essential for individuals to have their rights affirmed in this way, yet more is needed. Collective bargaining can also be used to change identified problems of discrimination proactively and systematically. It should not be necessary for individuals to go through often long and arduous individual complaint channels or grievance procedures to see effective change in this area. Collective bargaining should be used to revise exclusionary or discriminatory workplace rules and policies, to promote fair compensation schemes, inclusive employee benefits, and equitable treatment.

Collective bargaining should also address proactive institutional mechanisms to accommodate group-based differences where it is not possible or desirable to change the broader rule or universal policy. "Accommodation" is the notion whereby workers have the right to be treated differently in order to enable their inclusion in the workplace despite their differences. For example, an employee with a sight or hearing impairment may require special office equipment to palliate the effects of his/her disability. Though unions have sought to enhance employment opportunities and accommodation in the workplace, there has been resistance when this has involved deviations from traditional seniority or other workplace rules. Collective bargaining should ensure that accommodation policies are in place, so that individual accommodation measures are taken when necessary.

As noted in a report by the ILO-ICFTU, "[t]he current inadequacies of equality legislation and its enforcement in many countries underscore even more the potential of collective bargaining to address equality of opportunity and treatment within the terms and conditions of employment" (ILO, 2002b, p. 34). Negotiating for equality with equality-seeking groups is bound to be more complicated and challenging than negotiations between habitual negotiating partners; it can,

however, really enhance the effectiveness of the collective bargaining process.

Interaction between state labour regulatory initiatives and the promotion of equality through collective bargaining

Two regulatory initiatives that can help promote equality through collective bargaining are particularly important. First, enabling legislation is needed, to ensure that barriers to access to collective bargaining are minimized and that more facilitative measures are put in place. This reflects the need for broadly inclusive and democratic bargaining models as well as minimally decent working conditions and wage-setting procedures below which no group can settle, however limited their bargaining power. Second, prohibitive legislation is needed, to ensure that collective agreements that would impede equality are not reinforced by the State. But equality demands more than blanket prohibitions on certain forms of action; legislation mandating reasonable workplace accommodation and proactive initiatives, such as pay equity and employment equity, helps to ensure that systemic discrimination against equality-seeking groups is effectively eradicated. Regulatory frameworks that encourage the equitable, democratic participation of all workers in workplace governance are essential to establishing a mutually reinforcing role for equality and collective bargaining across national, transnational and international levels of governance.

Legislative engagement with the collective bargaining process

Collective bargaining legislation

Much has been written about the comparative advantages of particular national collective bargaining regimes (Olney, 1996, pp. 35-36; Trebilcock, 1994; Windmuller (1987)), so a detailed discussion will not be presented here. Yet the assumption that equality and collective bargaining are each in some sense "private" matters may have stood in the way of more pointed analyses of the enabling role of the State in relation to equality. But regulation on equality, secured in many countries through constitutional and international human rights forums and judicial enforcement leading ultimately to legislative change (Sheppard, 1992), should not be understood as the "public" dimension of a fundamentally "private" negotiating relationship. Collective bargaining on equality further complicates this dichotomy, because of the implication that there is an important role for private actors to play, within carefully crafted state regulatory frameworks, to ensure that equality is realized. Civil society is

not necessarily a preferred alternative to the State; rather, both need to be strengthened to "deepen democracy and undermine injustice, especially that deriving from private economic power" (Young, 2000, p. 156).

The choice of collective bargaining regime and of specific labour relations mechanisms within a given regime affects the extent and effectiveness of bargaining on equality issues. For example, some labour relations scholars have affirmed that centralized wage bargaining, which is more prevalent in countries with citizenship-based, social partnership models of collective relations, plays a particularly significant role in narrowing wage differentials, notably those based on gender (Curtin, 1999, p. 22). By contrast, decentralized wage bargaining systems, increasingly prevalent in voluntarist labour relations systems or in systems based on a democratic choice model of collective relations, tend to accentuate enterprise-specific productivity or efficiency concerns to the detriment of cost-of-living indexation of wages and broader "solidaristic" strategies.[15] They run the risk of exacerbating pay differentials, "since dominant groups are able to protect their differentials leaving other workers with less industrial muscle, including women, at the bottom of the wages hierarchy" (Curtin, 1999, p. 22).[16] Moreover, there has been a marked trend toward greater decentralization of pay determination, influenced largely by a wish to promote labour market flexibility (Spyropoulos, 2002, p. 393; Ozaki, 1999, pp. 25, 69 and 73). Potentially, this trend could exacerbate such differences.

Of course, the hybrid nature of many collective bargaining systems can mitigate the impact of some structures by superimposing others. For example, in systems that allow central bargaining to set wage minima and maxima, sectoral-level bargaining for wage increases may affect the resulting differential. Also, the hybrid nature of industrial relations systems includes the growing influence of transnational regulatory structures, international norms and comparative experience (Bercusson, 1997; Laborde, 2001). So, on the issue of wage disparities, the development within European Union law of the proactive notion of equal pay for work of equal value has served as a counterbalancing force, offering another means with which to challenge the development of pay differentials in the European Union. Similar developments within domestic jurisdictions such as those of Ontario and Quebec, which apply to both public and private sectors, can also counteract some of the wage effects

[15] Ozaki defines solidaristic policies as "policies behind which there is a global concept and which ensure a certain degree of solidarity in the solutions to the problems dealt with, thereby minimizing inequalities and social exclusion" (1999, p. 118).

[16] See also, Fudge and McDermott (1991) for an analysis of the equality implications of bargaining unit structures on bargaining power, notably on pay, in the North American context. For example, if we take the airline industry, a bargaining unit composed exclusively of pilots will have greater bargaining power than a unit composed of ticket counter personnel. If pilots and ticket counter personnel are included in the same bargaining unit, the bargaining power of ticket counter personnel is enhanced.

of occupational segregation and limited bargaining power in traditionally decentralized systems of wage-bargaining.

Some collective bargaining mechanisms thought to enhance equality may actually prove to raise challenges for equality, too. Consider, for example, the legislative extension of collective agreements. By ensuring that the terms of a collective agreement extend to an entire industry, legislative extension has permitted the organization of a wide range of hitherto excluded categories of worker (Windmuller, 1987, p. 157). These workers are likely to be women or to belong to other historically disadvantaged groups. Certainly, this kind of negotiated "specific regulation" that is sensitive to the particular workplace context has a protective dimension (Blackett, 1998). However, the extension itself can represent a real obstacle to the promotion of democratic participation. Legislative extension has been criticized for offering a "free ride" to workers thus covered, since it removes some of the material incentive for these workers to join a union (Windmuller, 1987, p. 7). Of comparable concern is the possibility that meaningful consultation with the workers in the particular industry may diminish, leading to a *de facto* representation gap despite the extended coverage, and a corresponding inability to understand and defend workers' equality concerns effectively. The equality-enhancing value of collective bargaining must therefore be considered in terms not only of its protective function but also of its capacity to foster meaningful dialogue by enfranchising workers. Carefully crafted approaches to legislative extension and more recent proposals to adopt broadly based bargaining schemes hold much promise for equality (Vosko, 2000). For that potential to be harnessed, greater attention needs to be given to ways in which equality-seeking groups can participate actively in the construction of the regimes and in the elaboration of the extended contractual terms.[17]

Minimum standards legislation

A crucial equality role is played by legislation setting a floor of decent working conditions, including a minimum wage, restrictions on hours of work, minimum rest periods, as well as occupational safety and health regulations. The existence of these laws and associated inspection and enforcement systems confirms that certain matters should not be left to bargains struck by the parties; those bargains are presumed to be inherently inequitable. Legislation on minimum working conditions therefore remains important for the promotion of equality. It should be noted that challenges to its legitimacy in the 1980s and 1990s have been overtaken by the more contemporary recognition that dignity demands that

[17] See Lyon-Caen and Pélissier (1990), noting that judges tend to interpret extended agreements in a manner consistent with regulation rather than contract; and Windmuller (1987, p. 135), noting that the classification of this mechanism as a formerly private agreement is transformed into a kind of "industrial common law".

all workers have access to decent work (Ozaki, 1999, pp. 2, 16-19 and 69-72).

There is sometimes an overlap between minimum standards and specific human rights legislation, for example, in the area of non-discrimination measures during pregnancy, and maternity leave. The role played by this type of legislation is not entirely captured by the term "prohibitive". Certainly, at one level, labour standards and/or human rights legislation that offer privacy protection and as a result prohibit pre-employment and routine mandatory workplace testing for HIV/AIDS are effectively prohibitive in nature, and overlap in important ways with human rights prohibitions by reducing discriminatory reprisals. But legislation on working conditions has a broader, enabling role by raising the bargaining floor, which is particularly useful for those categories of workers whose bargaining power is most limited. Legislated minima seek to ensure that they do not make "unconscionable" labour market bargains (Fernandez, 1997), or that bargains are not enforced against those workers who should not be permitted to enter into an employment contract (notably minors). Regarding HIV/AIDS, strong privacy rights protection may then enable the parties to put HIV/AIDS on the bargaining table, providing incentives for the parties to devise more effective, compassionate and dynamic approaches to the workplace dimensions of this epidemic. The constructive legislative approach curtails punitive approaches to HIV/AIDS that further inhibit the productive capacity of the workplace actors; it seeks instead to mobilize tripartite-plus workplace actors to ensure they use collective bargaining to devise constructive policies and codes of conduct to deal creatively with this particularly pressing problem (ILO, 2000).

Human rights legislation

Through its support for proactive equality measures to frame collective bargaining, the State recognizes that it supports collective bargaining at least partly because of its capacity to include all social groups. Human rights legislation that uses collective bargaining to promote equality goals validates the centrality of democratic participation, and marshals the specific insights that only local actors can bring to their workplace to the benefit of equality. Previously excluded workers are thus able to develop their workplace governance capacity, since "a public is always better if more of its members have more developed capacities than fewer" (Young, 2000, p. 80).

Research suggests that a legal framework supporting equal rights is often a necessary precondition to getting social partners to address equality issues in bargaining (Dickens, 1998). In turn, the effective enforcement and "implementation of legislative measures [in favour of human rights] may often depend on supporting institutions and policies which are derived from a collective framework" (Curtin, 1999, p. 23).

General equality rights and protection against discrimination

Constitutional and international human rights guarantees against discrimination focus on the interventionist role of the State in promoting (or failing to promote) equality. Regarding explicit exclusions from collective bargaining regimes, the main issue is the inadequacy of state regulatory responses. In many countries, collective bargaining legislation is subject to constitutional scrutiny and must comply with constitutional guarantees on equality rights and freedom of association.

Statutory human rights provisions are the most prevalent means of protecting individuals and groups against discrimination at work. The most common legislative approach to outlaw discrimination accords individuals a right not to be discriminated against in employment and provides them with retroactive legal recourse should it occur. Human rights protection against discrimination at work is generally extended to social groups who in the past have been excluded in some way or subjected to discriminatory treatment. Many human rights documents enumerate specific grounds of discrimination, such as race, national or ethnic origin, colour, sex, religion, age, civil status, and political affiliation. More recently, new grounds of discrimination have been recognized in some human rights laws, for example, physical and mental disability, and sexual orientation. Increasingly, general non-discrimination clauses are being included in collective agreements.

Statutory non-discrimination provisions also set important limits to collective bargaining and freedom of contract. Where individual collective agreement provisions deviate from human rights norms secured in legislation, the latter take precedence over the former. There are cases, for example, of seniority provisions being challenged as discriminatory pursuant to human rights legislative guarantees.[18]

Certainly there are circumstances in which market forces alone can favour equality-enhancing collective agreements. For example, in countries with full employment, employers may be particularly keen to attract women and, as a result, include measures to foster women's access to the workforce, including anti-harassment policies, childcare facilities, and generous maternity leave provision. In other cases, market demand in certain niche areas, such as telecommunications services, may encourage employers to seek workers with excellent foreign language skills; this may lead those employers to adopt equality-affirming policies in order to attract and promote members of the ethnic or linguistic group concerned (Wrench, 1999, p. 231). While such initiatives should be encouraged, there are several risks associated with relying on these initiatives to the exclusion of broader regulatory frameworks. First, they overlook the

[18] Some human rights statutes explicitly exempt seniority from the reach of non-discrimination guarantees. See, for example, *Americans with Disabilities Act*, U.S.C. Title 42, sections 12,101-12,213 (1990).

larger question of bargaining power, favouring those workers whose labour market position and skills enable them to exercise a certain amount of bargaining control. The equality gains are therefore distributed unevenly across economic sectors. Second, the durability of the gains in times of economic recession or crisis is increasingly being questioned. The risk that disadvantaged groups are perceived as a reserve category of labour subject to less favourable treatment in times of high unemployment warrants attention. Third, certain historically disadvantaged groups have more difficulty than others in overcoming stereotypical assumptions about their workplace capacity. Finally, the need for proactive human rights legislation becomes particularly acute when private-sector actors do not voluntarily follow up these initiatives (ibid., p. 231).

Employment equity

Human rights advocates have long argued that implementing human rights on the basis of individual or group-based complaints of discrimination is insufficient to redress pervasive problems of inequality at work. In response, legislators have explored more proactive approaches to securing equality at work, mandating the establishment of employment equity and affirmative action programmes, and pay equity schemes. These programmes require barriers to equality in the workplace to be assessed, discriminatory standards and practices to be revised and, in some cases, special group-based preferences (i.e. affirmative action) to be introduced in order to expedite the attainment of equality. Collective bargaining, where applicable, then takes place within a regulatory framework that requires positive action on equality in the workplace. This means that equality is a mandatory item on the workplace agenda.

Most employment equity legislation institutionalizes some degree of worker participation in the pursuit of equality. Integrating proactive equity initiatives into the collective bargaining process permits a "bottom-up" approach to the institutional change required for equality to be achieved.[19] The requirement that workers be consulted and included on employment equity committees is often written into the legislative framework (Government of Australia, 1994a and 1994b). Though such worker participation applies to both unionized and non-unionized workplaces, a trade union presence helps to ensure that worker participation is autonomous and escapes structural power imbalances in the employer–employee relationship.

[19] See Dickens (1998), p. 43, where she criticizes "top-down" legislative interventions or unilateral employer initiatives as inadequate for human rights implementation. For a discussion of the importance of "bottom-up" approaches to equity in the workplace, see Sheppard and Westphal (1992), pp. 5-36.

Pay equity

Pay equity legislative initiatives have been prompted by recognition that work traditionally done by women and other historically disadvantaged groups[20] in the paid labour force has been systematically undervalued (Eyraud, 1993; Gunderson, 1992). These legislative schemes require a proactive approach to sex-based pay inequities to secure equal pay for work of equal value or work of comparable worth. As explained above, collective bargaining has traditionally been concerned with pay levels. Does pay equity legislation enhance or conflict with unions' traditional role in securing better wages through collective bargaining?

Pay equity has generally been endorsed by trade unions and legislative initiatives have been relied upon to bolster union bargaining power regarding securing pay equity. As with legislation on minimum standards, pay equity legislation means that collective bargaining must consider how pay equity may be achieved, not whether it should be an objective.

The complexities of pay equity are a challenge for law-makers and for employers and trade unions, for the notion of comparable worth contests a market-based determination of wages and challenges labour market inequities, which are often closely linked to social, religious and cultural norms. The situation becomes even more complex where employers innovate with profit-sharing schemes to supplement traditional forms of employment remuneration.

The limitations of pay equity initiatives have already been indicated. In general, they address horizontal but not vertical economic inequities (Evans and Nelson, 1989, p. 12; Fudge and McDermott, 1991). Pay equity has been used to address gender-based inequities, but has not been extended to other widespread inequities in pay (Scales-Trent, 1984).

Yet trade unions have criticized the effects of pay equity schemes on a number of grounds, notably, that workers risk seeing their historical gains undermined by complex arguments about the value of particular jobs. Even the task of ascertaining the worth of particular jobs has been criticized as an intrusion by management and human resources experts into workers' lives. The struggle for fair wages becomes sidetracked and overly technical because of the need for sophisticated job evaluation schemes and complex statistical analysis to ascertain whether pay levels are discriminatory (Evans and Nelson, 1989, p. 13). Where job segregation occurs throughout an industry or a workplace, implementation of pay equity is rendered more difficult because of the lack of a (male) comparator. Large public-sector workplaces with a wide range of job categories appear to provide the best context for the implementation of pay

[20] As noted, although Convention No. 100 refers specifically to gender, Convention No. 111 extends the principle to all the groups covers.

equity. Other problems are linked to the impact of structural adjustment in the economy, which erodes the wages and benefits of the male worker norm upon which pay equity schemes are based. Despite these challenges and in view of the regulatory initiatives in some countries, it remains critical for trade unions to play an active role, rather than leaving the determination of pay equity to employers. For, as in employment equity, the enforcement of pay equity norms is greatly enhanced by independent worker representation.

Retreat of the State from labour regulation?

Despite the inherent pluralism of labour relations law, rooted in the ability of the parties to collective bargaining to make the laws that govern their workplace relations (Arthurs, 1996, p. 3), state regulatory action is crucial to ensure the viability of both equality and collective bargaining. It is necessary to consider the impact of the retreat of the State from labour regulation on the effectiveness of collective bargaining in the promotion of equality.

With the unravelling of the welfare state in the 1980s and 1990s, and the associated emergence of a preference for minimal state intervention, has come a challenge to received wisdom about the role of the State in promoting equality. The "threat of exit" by footloose employers may prevent States from assuming a more proactive regulatory role, "re-regulating" instead to attract foreign direct investment and to encourage multinational enterprises to stay (Robé, 1997, pp. 70-71).

If traditional labour relations law is increasingly ineffective, then reliance on it to promote equality is correspondingly ineffective. That workforce changes are accompanied by "increasing concentrations of poverty and long-term unemployment, [yielding a] growing racialisation or ethnicisation of poverty and exclusion" (Wrench, Rea and Ouali, 1999, p. 6) further compounds the difficulties of pursuing equality.

But the situation is not totally bleak. Labour law has always been in a state of flux in response to changing social, technological and economic conditions (Spyropoulos, 2002, p. 391). In the current decade it has been encouraging to see, as a result of questioning of the viability of the "minimal State", the emergence of a carefully tailored approach to target constructive state regulatory involvement on promoting an integrated approach to social policy and economic development (Birdsall and de la Torre, 2001, pp. 4-10). This approach includes promising possibilities – at the transnational level, too (Moreau, 2002, p. 385; Moreau and Trudeau, 2000, p. 915) – for the interface between effective recognition of the right to collective bargaining and the promotion of equality. The ILO has a crucial role to play in conceptualizing and operationalizing this shift.

Given that the ILO Declaration reaffirms freedom of association and the effective recognition of the right to bargain collectively, the

notion of collective labour relations is not directly challenged (at least not at a theoretical level); the issue is rather that its effectiveness in an increasingly transnational economic context is seriously called into question (Moreau, 2002, p. 394). Yet some of the recent empirical literature suggests that in some countries, when unions give high priority to equality-enhancing concessions and workplace changes, they advance those equality priorities relatively successfully through collective bargaining (see, for example, Kumar and Murray (2002), p. 20). How far, then, does the promotion of equality enhance the effectiveness of traditional industrial relations law and practice, by broadening their representational base and strengthening their claims to democracy?

Recently, some employment discrimination research has attempted to consider how dynamic regulatory approaches[21] can help to eradicate systemic workplace bias, exclusionary employment practices (including "glass ceilings" (Wirth, 2001)) and harassment notably in multi-skilled, teamwork contexts in which mentoring (Blackett, 2001b) and other informal procedures are important for promotion (Sheppard, 1995 and 1998). This research documents enterprise-level attempts to foster compliance by articulating policies and developing an interactive problem-solving culture. Though controversial in that the approaches may replace hard rule enforcement through judicial or quasi-judicial mechanisms (Bisom-Rapp, 2001), they are nevertheless attracting growing interest because they bring to the workplace a range of newer, potentially constructive participants (such as specialized workplace diversity trainers) to help ensure compliance with non-discrimination principles. Trade unions can lead by example with these more localized approaches to workplace governance and negotiate the terms of policies, assist with training and the choice of trainers, while ensuring that the mechanisms do actually both respond to the concerns of unionized workers and preserve their legal rights and recourses.

The future interface between collective bargaining and equality is also expected to involve opportunities for social dialogue at new levels of governance. If these complement collective bargaining,[22] they should also be harnessed to promote equality. For example, the EU Directive 94/95 on works councils within the European Union (European Commission, 1994) and comparable forms of labour–management representation

[21] Sturm is careful to resist fully privatized models, insisting on the relationship between state-enforced rule-making and regulatory action "closer to the normative line"; see Sturm (2001), pp. 563-564.

[22] See the important cautions raised by Lord Wedderburn about the EU emphasis on consensual consultations absent adequate protection of collective bargaining rights. See Wedderburn (1997), pp. 26-34.

(e.g. in Japan and the Republic of Korea)[23] may be harnessed to promote the representation of traditionally marginalized groups in workplace management.[24] These outcomes may increasingly be required by law, as the EU extends its equality of treatment provisions beyond sex discrimination (Hoppe, 2002) to include all discrimination based on race, ethnic origin, religion or conviction, disability, age and sexual orientation.[25] Yet trade liberalization has tended to place a premium on promoting greater market flexibility to foster economic competitiveness (see Wedderburn (1997), pp. 5-6). The social dimensions of globalization need to infuse economic goals, (see World Commission on the Social Dimension of Globalization, 2004) to ensure that the growth in transnational regulatory regimes does not weaken negotiated equality protection. Greater advances in collective bargaining and comparable approaches that promote equality through democratic workplace participation at different levels of governance may reduce reliance on unilateral initiatives, such as codes of corporate conduct (Blackett, 2001a, pp. 419-420).

Government actors also play an important role in ensuring broad representation on various higher-level representational structures. Worth mentioning is the importance of participation by representative organizations of workers and employers, and wider dialogue with other important social actors, including historically disenfranchised groups, in new regional integration initiatives to develop the social aspects of transnational governance constructs, which should be harnessed to promote equality (World Commission on the Social Dimensions of Globalization, 2004, p.73, para. 329).

Conclusion

Surely, "[a] culture of democracy and dialogue cannot be improvised" (Tomei, 1999, p. 12). Rather, if collective bargaining mechanisms are not equality-neutral, then proactive measures must be taken to tackle this inequality of access (Young, 2000, p. 52). The measures must involve all the tripartite actors, as well as a broader mix of civil society

[23] To date this role is quite limited and the subject of some controversy, necessarily beyond the scope of this paper. Some countries (e.g. the Netherlands) have been better than others at ensuring an effective demarcation between works councils and collective bargaining. For a brief discussion of these tensions, see Ozaki (1999), pp.111-113; Spyropoulos (2002), p. 396, noting that the absence of a sufficient legal framework for collective bargaining in MNEs remains a serious obstacle.

[24] See, for example, Bercusson (1997), p. 153, commenting, albeit without specific attention to traditionally excluded groups, on the critical issue of legitimacy through representativeness that arises when EU institutions seek to involve workplace actors in workplace governance.

[25] See the Treaty of Amsterdam, Article 13, and EU Directive 78/00 of 27 November 2000. See also Bell (2000); Waddington (2000); and Whittle (1998).

participants representing marginalized groups of workers and emerging employment relationships. The measures entail thinking beyond old categories and traditional territorial boundaries. New, overlapping, or complementary approaches must be developed to ensure that the right to collective bargaining is effectively recognized through the promotion of equal access.

Yet collective bargaining could do a lot to promote equality. Creative and context-sensitive agreements can greatly assist in promoting equality. For collective bargaining has not always advanced equal rights: certain issues have not been raised or accorded sufficient priority at the bargaining table because they concern a minority of workers; and collective agreement provisions may conflict with the equal rights of women or minority groups. In a climate of economic uncertainty, there is a particular risk of protecting "insiders" at the expense of "outsiders" who have been and continue to be denied equal employment opportunities. Finally, because the effectiveness of collective bargaining is affected by national and international legal regulatory frameworks and by labour market power, some of the most vulnerable unionized workers may not command sufficient bargaining power to advance equality objectives through the collective bargaining process. Providing basic labour standards and equality rights in law buttresses the bargaining power of workers; in other words, if the law already recognizes equality principles in the workplace, then negotiations can focus on how to achieve equality at work.

In this article the "retreat of the State" thesis on the interface between collective bargaining and equality is contested partly because it is argued that the ILO has an important role to play. Focused attention by the leading institution on international labour standards on how to support the social partners directly, and how to enhance governments' capacity to promote these activities would uniquely contribute to the promotion of equality and collective bargaining. Support might include research and analysis, notably on emerging patterns of collective bargaining and broader social dialogue especially at emerging governance sites. The ILO also has a continuing normative role to play, notably in providing training and other forms of technical assistance to help the social partners effectively participate in and shape emerging workplace governance. ILO action can help to shape the direction of globalization, by holding actors accountable to the requirements of a decent work agenda and by providing them with the capacity to meet them.

Fundamental principles and rights at work are cardinal to this relationship. To be given their full meaning, they must be understood not only individually, but in their interaction. It has been contended that collective bargaining is effectively recognized when it responds to the challenge posed by unequal access. It has also been argued that equality can enhance the effectiveness of collective bargaining, and that the ILO

should continue to play a leading role in researching and strengthening the interface between these two rights, demonstrating their mutually reinforcing potential. In an increasingly integrated world, they promote a vision of both the social and the economic as central to sustainable development .

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